INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	17

CITATIONS

Cases:

Cohens v. *Virginia*, 6 Wheat. 264 15

Elm City Broadcasting Corp. v. *United States*, 235 F. 2d 811 5

Federal Communications Commission v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 4

Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U.S. 470 11

NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 8

United States v. *Storer Broadcasting Co.*, 351 U.S. 191 15

Statutes and Rules:

Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*:

Section 4(b), 5 U.S.C. 1003(b) 14, 15

Section 6(a), 5 U.S.C. 1005(a) 14

Section 6(d), 5 U.S.C. 1005(d) 14, 16

Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 1, *et seq.*:

Section 309 5

Section 309(b) 5

Statutes and Rules—Continued

Federal Communications Act, etc.—Con.
Section 309(d) 16
Section 309(d)(1) 4
Section 309(e) 5
Section 316(a) 4
Section 402 2, 11, 13
Section 402(a) 12, 13, 15
Section 402(b) 3, 9, 10, 11, 12, 13, 15
Section 402(b)(6) 3, 13
Section 402(c) 12, 14
Section 402(d) 14, 15
Section 402(e) 3, 7, 9, 11, 13, 14, 15, 16
Judicial Review Act of 1950, 5 U.S.C. 1031, *et seq.*, Section 8 12, 13
Rules of the Federal Communications Commission:
Section 1.361(a), 47 C.F.R. 1.361(a) 5, 6, 16
46 Stat. 845 9
Miscellaneous:
54 A.B.A. Rep. 461 10
Attorney General's Manual on the Administrative Procedure Act 16
H. Rep. No. 1750, 82d Cong., 2d Sess. 11, 15
S. Rep. No. 44, 82d Cong., 1st Sess. 15

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 899

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion and Order of the Federal Communications Commission (Pet. App. 1a–14a)[1] granting the application of New Orleans Television Corporation for modification of the construction permit for television broadcast station WVUA–TV is not officially reported. It is reported unofficially at 23 Pike & Fischer, Radio Regulation 1113. The order of the court of appeals (Pet. App. 15a) dismissing petitioner's notice of intention to intervene, the order (Pet. App. 16a) of the same panel

[1] References to "Pet. App." are to the appendix to the petition.

denying reconsideration, and the order (Pet. App. 17a) of the court denying reconsideration *en banc*, have not been reported.

JURISDICTION

The order of the court of appeals dismissing petitioner's notice of intention to intervene was entered on November 16, 1962. The order of the same panel denying reconsideration, and the order denying reconsideration *en banc*, were both entered on January 10, 1963. The petition for a writ of certiorari was filed on March 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, a trade association of certain television stations, sought to intervene in the appeal of one of its members from a Federal Communications Commission decision authorizing a change in the transmitter site of another, nonmember station. Appellant had alleged that the change might result in an increase in electrical interference with its own broadcasts and that the grant thus constituted an unlawful modification of appellant's license. The question presented is whether under Section 402(e) of the Communications Act of 1934, petitioner had standing to intervene in the appeal of its member station.

STATUTES INVOLVED

Section 402 of the Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 47 U.S.C. 402, provides in pertinent part:

* * * * *

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

* * * * *

(6) By any person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application [for the grant, renewal, or modification of, or for authority to transfer or assign or dispose of, a station license or construction permit, or for a permit under 47 U.S.C. 325].

* * * * *

(c) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

STATEMENT

On July 25, 1962, the Federal Communications Commission, in a Memorandum Opinion and Order released July 31, 1962 (Pet. App. 1a–14a), granted without a hearing the application of New Orleans Television Corporation (New Orleans Television) for modification of its outstanding construction permit for

television station WVUA-TV, Channel 12, New Orleans, Louisiana, thereby authorizing the applicant to move its transmitter site from a point about 35 miles from the city to a site closer to New Orleans.

In permitting this move in order to improve competitive conditions in New Orleans, the Commission waived its rules requiring a 190-mile spacing between WVUA-TV and station WJTV, on the same channel at Jackson, Mississippi, since the move of WVUA-TV brought it closer to WJTV and within 190 miles of the WJTV transmitter. Although the Commission imposed conditions upon New Orleans Television designed to provide WJTV's signal with protection equivalent to that afforded by the mileage separation rule, Capitol Broadcasting Co. (the owner of WJTV) alleged that additional electrical interference would result and that grant of the application was a modification of its license under Section 316(a) of the Communications Act, 47 U.S.C. 316(a). See *Federal Communications Commission* v. *National Broadcasting Co.* (KOA), 319 U.S. 239.

Petitioner Association of Maximum Service Telecasters, Inc. (of which Capitol is a member) also participated in the Commission proceeding, over the objections of New Orleans Television which challenged petitioner's standing on the ground that it was not a "party in interest" who could file a petition to deny under Section 309(d)(1) of the Act, 47 U.S.C. 309 (d)(1).[2] In response, petitioner specifically dis-

[2] Section 309(d)(1) provides: "Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection

claimed any intention to participate as a "party in interest" under Section 309 of the Act, and argued that a wider category of "interested parties" should be permitted to respond to the New Orleans Television application than those entitled to file petitions to deny under Section 309.[2] The Commission agreed, noting that Section 1.361(a) of its Rules, 47 C.F.R. 1.361(a), permits "any person" to file informal objections to an

---

(b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit."

[2] See petitioner's "Opposition to Motion to Strike And Reply to WVUA-TV" at p. 204 in the original record filed by the Commission below, which has been transmitted to this Court (hereinafter "F.C.C.R."). It should be noted that Section 309(e), 47 U.S.C. 309(e), provides that when an application is designated for hearing, "parties in interest" shall be entitled to participate in the hearing. See *Elm City Broadcasting Corp. v. United States*, 235 F. 2d 811 (C.A.D.C.), construing this requirement as it formerly appeared as Section 309(b) of the Act, 47 U.S.C. (1958 ed.) 309(b).

application,[4] and that in an earlier general rule-making proceeding concerning the question of short-spaced assignments (in which petitioner had participated) the Commission had stated that "interested parties may respond to the application" of New Orleans Television when the request for a short-spaced assignment at New Orleans should be filed (Pet. App. 2a–3a). The Commission found it appropriate to allow "the limited participation sought by [petitioner]" (Pet. App. 3a).

The Commission granted New Orleans Television's application without hearing, and Capitol appealed to the court below. Petitioner, however, did not file an appeal. It filed instead a "Notice of Intention of Association of Maximum Service Telecasters, Inc., To Intervene" (R. 15–22)[5] in the Capitol appeal, stating that the questions raised by the appeal were of vital interest to petitioner and its members (R. 17–19). The Commission, on October 3, 1962, filed a "Motion To Dismiss Notice of Intention To Intervene of The Association of Maximum Service Telecasters, Inc.," on the ground that petitioner was not an interested

[4] Section 1.361(a) provides: "Grants without hearing of authorizations other than licenses pursuant to construction permit; procedure for filing informal objections.—(a) Before Commission action on any application for an instrument of authorization, other than a license pursuant to a construction permit, any person may file informal objections to the grant. Such objections shall be signed by the objector. The limitation on pleadings and time for filing pleadings provided for in § 1.13 shall not be applicable to any objections duly filed under this section."

[5] References to "R" are to the record of proceedings in the Court of Appeals.

party under Section 402(e) of the Communications Act in that it would not be adversely affected by a reversal or modification of the Commission's order (R. 33–36). Petitioner opposed this motion on October 11, 1962 (R. 37–43). On October 12, 1962 New Orleans Television, which had itself intervened in the court of appeals, also moved to dismiss petitioner's notice of intervention. It agreed with the Commission's position and also urged that petitioner did not have a sufficient degree of interest to intervene, even if persons aggrieved by a Commission order, as well as those who would be aggrieved by its reversal, are proper intervenors (R. 45–48). This motion was opposed by petitioner on October 19, 1962 (R. 50–60).

By order of November 16, 1962, the court below, "[o]n consideration of the motions of appellee and intervenor New Orleans Television Corporation," granted the motions and dismissed the notice of intention to intervene (Pet. App. 15a). On December 1, 1962, petitioner filed a petition for reconsideration and/or reconsideration *en banc* (R. 67–82). This petition asserted, *inter alia,* that, "The Court's Order does not indicate whether one or both of these arguments [of the Commission and New Orleans Television] were accepted, or whether the Order was based on some other ground" (R. 68). Petitioner requested that, if reconsideration were denied, the court indicate the grounds for its dismissal order "so as to facilitate AMST's determination whether to file a Petition for Certiorari and, if one is filed, to permit its meaningful

consideration by the Supreme Court" (R. 69). Both the Commission (R. 83–87) and New Orleans Television (R. 88-92) opposed the petition for reconsideration.

On January 10, 1963 the same panel which had issued the dismissal order denied reconsideration (Pet. App. 16a), and the court *en banc* (Judge Wright not participating) also denied reconsideration (Pet. App. 17a).

On January 30, 1963, petitioner filed a motion for leave to file a brief *amicus curiae* and to participate in oral argument. This motion was opposed by New Orleans Television, but not by the Commission. By order of February 18, 1963 the court below allowed petitioner to file a brief as *amicus curiae*, but denied the request for oral argument.

ARGUMENT

The court of appeals properly dismissed petitioner's notice of intention to intervene. Its action presents no question of general importance warranting review by this Court.

1. In the first place, petitioner is not prejudiced by the order below. It is an association of television stations one of whose members claims specific injury from a Commission order permitting New Orleans Television to move its transmitter. The member station, Capitol, is prosecuting an appeal to the court below; thus, petitioner cannot claim the need to represent the interest of injured members as in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449. Petitioner and its other members do not assert any specific in-

jury from, or interest in, the order on review below. They have, rather, an interest common to many persons in the industry in the precedent set by the Commission decision insofar as it might affect future situations. This interest of petitioner is of the type commonly advanced as the basis for *amicus* participation, and it is satisfied by the order of the court of appeals which allowed it such participation.

2. The ruling below, moreover, is in accord with the provision of the Communications Act governing intervention in the court of appeals. The proceeding below is an appeal from an order granting modification of a construction permit, brought under Section 402(b), 47 U.S.C. 402(b). Section 402(c) authorizes "any interested person" to intervene in an appeal filed pursuant to Section 402(b) of the Act, 47 U.S.C. 402(b), and defines an interested person as "Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of * * *." Petitioner is not an interested person within the plain terms of Section 402(c). It does not contend that it would be adversely affected by a reversal or modification of the Commission's order; rather, it opposes the order and urges its reversal.

This straightforward reading of Section 402(c) is, contrary to petitioner, quite consistent with the Congressional purpose. The predecessor to Section 402 (b) and (c) was enacted in 1930, 46 Stat. 844, 845, to correct inadequacies in the 1927 Radio Act's provisions for judicial review. The right of appeal was then

available only to persons whose applications had been denied, but not to persons who, like Capitol Broadcasting, would be injured by the grant of another's application. This defect was stressed by a committee of the American Bar Association, whose report, cited by petitioner, pointed out that a licensee in Capitol's position was permitted neither to appeal from a Commission order granting an injurious application, nor to intervene in support of an order denying such an application. 54 A.B.A. Rep. 461 (1929).* Both of these lacunae were filled with precision in the 1930 legislation. First, Section 402(b) extended the right of appeal, theretofore available only to applicants, to all persons "aggrieved or whose interests are adversely affected by" a Commission order. Second, the prede-

*To illustrate the unsatisfactory state of the law, the report offers the following example of a party claiming injury from short-spacing (54 A.B.A. Rep. 461; emphasis in original): "No right of appeal is given to a licensee whose rights under an existing license or construction permit may be vitally injured or destroyed by the granting of *another's* application. If A applies for authority to operate a 1,000-watt station on a channel occupied by B's station 400 miles away, and if the Commission grants the application, B's service area may be reduced to a small circle immediately surrounding his transmitter; reception in the rest of the area will be ruined by heterodyne interference. * * * If the Commission grants A's application, B cannot appeal no matter what the effect of the decision may be on B; if the Commission denies A's application and A appeals, B cannot defend his victory before the reviewing court, which may reach a decision in A's favor with similar injury to B."

In the footnote to the above passage, the report states that the Court of Appeals, D.C., had indicated informally that in the latter case it would consider a motion by one in the position of B to intervene on appeal as an *amicus curiae*.

cessor to Section 402(c) accorded the right of intervention to persons seeking to defend the Commission order, *i.e.*, to "interested persons," which it defined as those "who would be aggrieved or whose interests would be adversely affected by a reversal or modification."

The effect of this precise draftsmanship is twofold: *First*, the same degree of potential injury which must be shown in order to appeal under Section 402(b) must also be demonstrated by a would-be intervenor under Section 402(c). It is most doubtful that the petitioner here could make that showing. Indeed, petitioner concedes (Pet. 11) that the "person aggrieved * * *" phrase is language of art under which standing to appeal depends upon the prospect of electrical interference or financial injury from the Commission's action, *Federal Communications Commission* v *Sanders Brothers Radio Station*, 309 U.S. 470, 476–477, and apparently does not maintain that

---

Aside from this pre-enactment legislative history, Congress has subsequently confirmed our view of Section 402(c). The House Committee Report on the 1952 amendments to the Communications Act, which included revisions in the appellate procedures of Section 402, states with respect to Section 402 (c): "An 'interested party' is defined as any person who would be aggravated [sic] or whose interest would be adversely affected by a reversal or modification of the order of the Commission which is complained of." H. Rep. No. 1750, 82d Cong., 2d Sess., p. 17. This expression of Congressional intent supports the view that the second sentence of Section 402(c) was intended as a definition of "an interested person," and not, as petitioner argues (Pet. 13-15), as a specification of merely one class of persons who, among others, are to be considered as "interested."

its interest is of this nature. *Second*, and even more important, any person seeking to overturn a Commission decision reviewable under Section 402(b) must file its own appeal; it cannot simply intervene in support of the appeal of another party, claiming that the relief requested by the other party would also be satisfactory to it. Ordinarily, of course, parallel appeals will be consolidated. The point of the statutory procedure, however, is to ensure that each party challenging a Commission order will have brought itself within one of the categories enumerated in Section 402(b) and have filed promptly a notice of appeal setting forth succinctly the reasons upon which it intends to rely, as prescribed by Section 402(c).

3. The various other statutory provisions cited by petitioner which allow broader intervention only point up the differences in the scheme adopted by Congress for appeals from licensing orders of the Commission. For example, under Section 402(a) of the Act, review of Commission rule-making orders (and other orders not specified in 402(b)) is governed by the Judicial Review Act of 1950, 5 U.S.C. 1031-1042, Section 8 of which (5 U.S.C. 1038) explicitly authorizes intervention by parties "whose interests will be affected if an order is *or is not* enjoined, set aside, or suspended" (emphasis supplied).[*] The distinction thus drawn

[*] Section 8 provides in full: "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Com-

between intervention in Section 402(a) cases and intervention in 402(b) cases is a meaningful one. In rule-making proceedings, a large number of persons can be expected to submit comments to the Commission and to be interested parties on judicial review. In an appeal from a licensing action, however, the number of parties affected is usually quite small. Typically, a losing applicant or a station aggrieved by a license grant files an appeal, while the successful applicant intervenes in support of his victory. The requirement that aggrieved persons, in order to achieve the status of a party, pursue the remedy of appeal afforded by Section 402(b)(6) does not result, therefore, in an unwieldy multiplicity of suits, as might be the case if the same procedure were applicable to Section 402(a) proceedings. Accordingly, there is no need to interpret the narrower language of Section 402(c) as congruent with the broader intervention provision of Section 8 of the Judicial Review Act. Furthermore, the fact that the applicability of Section 402(c) is confined to Commission licensing actions appealable under Section 402(b) points up the lack of general importance of the question presented here.

---

munities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order."

As petitioner correctly notes (Pet. 21), the use of rule-making as a vehicle for assigning television channels to particular communities dates only from 1952, contemporaneously with the most recent Congressional examination of Section 402 and long after enactment of the provisions with which this case is concerned.

4. Finally, contrary to petitioner's assertion (Pet. 17–19), the fact that the term "interested person" or similar phrases may have a broader meaning in Section 402(d) of the Communications Act, 47 U.S.C. 402 (d), and in Sections 4(b), 6(a) and 6(d) of the Administrative Procedure Act, 5 U.S.C. 1003(b), 1005(a) and 1005(d), does not warrant the conclusion that its scope must be equally broad under Section 402(e).

The notice of the filing and pendency of an appeal which, under Section 402(d), must be given by the Commission to "each person shown by [its] records * * * to be interested in said appeal," is designed to inform not only would-be intervenors, but also other persons who evinced an interest before the Commission which would warrant advising them of the further course of the proceedings. Prior to 1952, the statutory notification of the filing of an appeal (then contained in Section 402(c)) was given only "to each person shown by the records of the Commission to be interested in such appeal *and to have a right to intervene therein under the provisions of this section*" (48 Stat. 1093). (Emphasis added.) In the 1952 amendments to the Communications Act, however, Congress eliminated the italicized portion of this notice provision. Yet it simultaneously reiterated its intent that the term "interested person" in the intervention section (Section 402(c)) be "defined as any person who would be aggravated [sic] or whose interest would be adversely affected by a reversal or modification of the order of

the Commission which is complained of." H. Rep. No. 1750, 82d Cong., 2d Sess., p. 17. Petitioner's assertion that the change in Section 402(d) "was simply deleting a redundancy," (Pet. 19) is its own unfounded conjecture.

Nor does it follow that because Section 4(b) of the Administrative Procedure Act requires an "agency [to] afford interested persons an opportunity to participate" in rule-making, Section 402(c) should be construed to require the court of appeals to permit an equally wide category of persons to intervene in an appeal under Section 402(b) of the Communications Act. Participation before the agency may be broader than that authorized before a court. Moreover, as we have already pointed out, *supra*, p. 13, considerations appropriate to rule-making proceedings—which are reviewable not under Section 402(b), but under the Judicial Review Act of 1950,[10] are not necessarily

[10] *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 193, upon which petitioner relies (Pet. 17, 18), is inapposite to the present case. The statement in the decision quoted by petitioner (Pet. 17), to the effect that parties who could file statements under Section 4(b) of the Administrative Procedure Act "might also intervene in appeals," is dictum on a question not briefed and not "investigated with care, and considered in full extent." *Cohens* v. *Virginia*, 6 Wheat. 264, 399-400. Although the Court referred to Sections 402 (d) and (e) of the Communications Act, which are applicable only to appeals under Section 402(b), see S. Rep. No. 44, 82d Cong., 1st Sess., p. 11; H. Rep. No. 1750, 82d Cong., 2d Sess., p. 17, the statement was made in the course of reciting the history of the Commission rule-making proceeding of which review had been sought under Section 402(a) of the Act, 47 U.S.C. 402(a).

appropriate to licensing proceedings. Similarly, there is no reason to attribute to the phrase "interested person" in Section 402(c) of the Communications Act the same meaning which that term has in Section 6(d) of the Administrative Procedure Act, 5 U.S.C. 1005(d), which provides for notice and a statement of grounds in denying any written application, petition, or other request "of an interested person." In any event, if the scope of the phrase in Section 402(c) were equivalent to that in Section 6(d), petitioner would clearly have no right to intervene. For the *Attorney General's Manual on the Administrative Procedure Act*, p. 70, speaking in reference to Section 6(d), notes that "with respect to formal proceedings, the only interested persons are those who are 'parties' to such proceedings within the meaning of section 2(b)." Here, however, petitioner specifically disclaimed any intention to participate as a "party in interest" under Section 309(d) of the Communications Act, 47 U.S.C. 309(d), and was permitted to file an informal objection to the application only as might any other member of the general public under Section 1.361(a) of the Commission's Rules, 47 CFR 1.361(a) (Pet. App. 2a–3a). See Statement, *supra*, pp. 4–5. Thus, if the Commission had held a formal hearing on the application, petitioner would not have qualified as a "party in interest" under Section 309(d), nor as an "interested person" under Section 6(d) of the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

LIONEL KESTENBAUM,
JOEL E. HOFFMAN,
Attorneys.

MAX D. PAGLIN,
General Counsel,
DANIEL R. OHLBAUM,
Associate General Counsel,
RUTH V. REEL,
Counsel,
Federal Communications Commission.

APRIL 1963.